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In the Supreme Court of the United States

OCTOBER TERM, 1914

LUMBER PRODUCTS ASSOCIATION, INC.,
(a corporation), et al.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of

Lumber Products Association, Inc. (a corporation),
Acme Manufacturing Co., Inc. (a corporation),
Eureka Sash, Door & Moulding Mills (a corpora-
tion), Carl Warden, Harry W. Gaetjen, Charles
Monson, Fred Spencer, W. P. Holmes, J. A. Hart,
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This cause is here on writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit (R. 1697), which affirmed judgments of conviction (R. 1371, 1391) of the District Court for the Northern District of California, Southern Division, in a

NOTE: All italics in quotations are ours.

criminal action under Section 1 of the Sherman Act (Title 15, U.S.C., Sec. 1).

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 1674-1696) is reported in 144 Fed.(2d) 546.

JURISDICTION

The judgment of the court below was entered on August 23, 1944 (R. 1697). A petition for a rehearing was filed on September 22, 1944 and denied on October 14, 1944 (R. 1698). A petition for certiorari was filed on November 11, 1944 and was granted on January 2, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

STATEMENT OF THE CASE

Lumber Products Association, Inc., one of the petitioners, is an association of manufacturers of millwork in San Francisco, California. The other petitioners are members of that association. Together with three groups of labor unions and labor union officials, and two other groups of manufacturers, these petitioners were indicted (R. 4) in June, 1940, for alleged violation of the Sherman Act. The indictment was in two counts. The second count (R. 34), charging a violation of Section 2 of the Act (monopoly), was voluntarily dismissed by the government (R. 1372,

1392), leaving only the first count, which charged a conspiracy to restrain trade. The petitioners and all the labor defendants severally demurred to the sufficiency of Count One (R. 42, 52, 92). The demurrers were overruled (R. 87, 103), and subsequently two of the employer groups, including the petitioners, entered pleas of nolo contendere. The labor union defendants, together with the third group of employers, went to trial on pleas of not guilty and were convicted. Sentence was then imposed on all the defendants, whether convicted after trial or upon the pleas of nolo contendere. Appeals were taken to the Circuit Court of Appeals on a single printed record by the two groups of employers who had pleaded nolo contendere and by the labor union defendants. The appeals were determined by the Circuit Court of Appeals in a single decision. From this decision the labor union appellants filed petitions for writs of certiorari (Cases 666, 667 and 674), and the two groups of employers also filed petitions (Cases 668 and 675). All the petitions have been granted.

For convenience, the present petitioners (Case 668) may be referred to as the Lumber Products group, and, since the second count of the indictment was voluntarily dismissed and the first count alone is involved, that count may hereafter be referred to as the indictment.

The issue presented by the Lumber Products group is whether the indictment states an offense under Section 1 of the Sherman Act and whether their demurrers should have been sustained. This same issue is presented in Cases 666, 667, 674 and 675. It also presents essentially the same question of law as that involved in the issues arising out

of the trial of the cause and presented in Cases 666, 667 and 674.

The gist and essence of the indictment is stated and discussed at pages 6 to 14 of this brief in the Summary and in the first section of the argument.

SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The assignments of error relied on are Nos. 1, 3, 4, and 7 (R. 1436, 1437). They are:

1. and 7. The court erred in overruling the demurrers filed by defendants [of the Lumber Products group].

3. Count One of the indictment does not state facts sufficient to constitute any offense by any of these appellants against the United States, either under Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Act, or otherwise.

4. The court erred in rendering judgment against and imposing sentence on each of these appellants, because Count One of the indictment fails to state facts sufficient to constitute an offense by any of these appellants against the United States, and because the demurrers heretofore filed by these appellants to Count One of the indictment should have been sustained.

STATUTES INVOLVED

The statutes involved are Section 1 of the *Sherman Act* (Title 15, U.S.C., Sec. 1), the *Clayton Act* (Title 15, U.S.C., Sec. 17, and Title 29, U.S.C., Sec. 52), and the *Norris-LaGuardia Act* (Title 29, U.S.C., Sec. 102, et seq.). These statutes are reproduced in the appendix to the petition in Case 667 and for that reason are not reproduced here.

ARGUMENT

SUMMARY OF THE ARGUMENT

The gist and essence of the indictment (R. 26-28) is that as part of a collective bargaining agreement between employers and unions in the San Francisco Bay area, concerning wages and working conditions, it was agreed between defendant employers and defendant labor unions that the employers would not purchase, and labor would not work on, millwork and patterned lumber from any mill maintaining wage and working standards inferior to those established by the agreement as the prevailing standards in the San Francisco Bay area.

That provision was directed at the maintenance of proper working conditions. It was not a boycott either of out-of-state mills, as such, or of nonunion mills, as such; it was aimed equally at union mills and local mills not maintaining working standards equal to those in the Bay area, and it did not reach out-of-state or nonunion mills that maintained such standards.

The Sherman Act forbids only unreasonable restraints, only such as are civilly invalid at common law. Conduct eliminating competition based on differences in labor standards does not violate the Sherman Act; therefore an agreement between unions and employers not to handle materials produced under labor standards inferior to those established by the agreement and prevailing in the particular community is entirely valid.

THE GIST OF THE INDICTMENT

The first subject of inquiry is the exact nature of the charge.

Despite some vague and general allegations which, if given a strained construction, might possibly be taken to charge more than the indictment really does, it is a fair statement, we believe, that the government has at all stages agreed with our view of the gist of the indictment and has not endeavored to claim for it a broader scope.

The gist of the charge is precisely what we have just stated it to be in the Summary. Thus, in the brief filed in the District Court in opposition to the demurrers, the government said (at p. 13):

"Viewed in the light of these ordinary rules of construction, Count One of the indictment at bar charges a conspiracy to exclude from the San Francisco Bay Area millwork and patterned lumber which has been manufactured under working conditions other than those prevailing in said area."

In its brief before the Circuit Court of Appeals the government said (p. 33):

"The gravamen of the charge in the indictment is that the defendants entered into an arrangement whereby the unions agreed that if the manufacturers would increase their wages the unions would in return refuse to work on millwork manufactured by others under a lower wage scale."

That the gist of the charge is as we have stated it is also apparent from an inspection of the indictment.

While paragraphs 26 and 27 (R. 26, 27) allege a combination to restrain commerce, they do so in terms of generality and conclusion, and it was necessary for the indictment to "descend to particulars." *United States v. Cruickshank*, 92 U.S. 542, 557-559; *United States v. Hess*, 124 U.S. 483; *United States v. Cowell*, 243 Fed. 730, 732; *United States v. Patterson*, 55 Fed. 605, 638; *United States v. John Reardon & Sons Co.*, 191 Fed. 454, 456; *Asgill v. United States*, 60 Fed.(2d) 780, 784 (4 Cir.); *Johnson v. United States*, 95 Fed.(2d) 813 (4 Cir.); *Fuller v. United States*, 114 Fed.(2d) 648 (9 Cir.). The charge is to be determined not from these two paragraphs alone but also from those that follow. *United States v. Armour & Co.*, 137 Fed.(2d) 269, 270 (10 Cir.).

Recognizing the necessity of descending to particulars, the indictment does so in paragraph 28 (R. 28). It is there alleged that to effectuate the conspiracy defendant manufacturers agreed to accede to wage scale demands of defendant unions, and

"(b) Pursuant to said understanding set out in paragraph 28, subparagraph (a), the defendants, on or about the 21st day of September, 1936, entered into a contract and agreement covering the wages to be paid to the members of defendant unions, in which said agreement it was further agreed that: " . . . no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement' (except certain named items)."

The gist of the indictment is the validity of the agreement alleged in subdivision (b) of paragraph 28. The following subdivisions of paragraph 28 refer to activities engaged in to carry out the agreement quoted in subdivision (b).

The opinion of the Circuit Court of Appeals speaks of a conspiracy to fix prices on out-of-state material,¹ and uses such invidious expressions as "splitting the take." To the extent that an agreement between unions and employers not to work on or handle materials produced under wage and working conditions less favorable to labor than those established by the same agreement may affect the price of the commodity by increasing the element of labor cost and by eliminating the competition of out-of-state material which, because of lower labor costs, can undersell the local product,—to that extent, but only to that extent, a price conspiracy is charged. When the Circuit Court of Appeals speaks of "monopoly pricing," it can have reference, legitimately, only to this effect on price of the elimination of competition in labor costs.²

The precise question in the case is whether this sort of restraint of trade is unreasonable or, indeed, is, within the

¹Thus, it states (144 Fed.(2d) 546, 549) that:

"there is here alleged a combination for a direct restraint upon commerce with an objective of destroying the competition of that commerce and permitting the fixing and maintenance of the local area prices at an arbitrary, artificial and non-competitive level. It is such intended restraints for such an objective at which the sanctions of the Sherman Act are directed."

²No charge of monopoly is in the case. That charge was made, in Count Two, but it was dismissed (R. 1372, 1392).

meaning of the Sherman Act, a restraint at all. To refer to the charged conspiracy as one of price-fixing is simply to beg the question by the use of select phraseology.

As we have said, neither in its briefs nor in its argument before either court below did the government claim that the indictment was a price-fixing indictment, unless in the sense just stated, nor, to our understanding, did it at the trial offer any evidence of price-fixing.

Moreover, the District Court, in passing on the demurrer, did not regard the indictment as charging price-fixing. In the case of *United States v. Bay Area Painters and Dec. Joint Committee*, 49 F.Supp. 732, the same judge sustained a demurrer to an indictment under the Sherman Act and had occasion to distinguish his ruling in the instant case, which was relied on by the government. In doing so, he stated his view of the present indictment (49 F.Supp. at 735) and made no reference to any charge of price-fixing, which, if it existed, would have been the clearest ground of difference.

To construe the indictment as charging a price-fixing conspiracy, in any other sense than might result from exclusion of material produced under inferior labor standards, would render it defective for repugnancy or, at least, would raise serious questions on that score.³ So far as the alleged conspiracy related to materials originating outside of California, a charge of an agreement to raise the

³For repugnancy as a defect, see 9 *Cyc. of Federal Procedure* (2d ed.), 256, Sec. 4072; 18 *Enc. of Pleading and Practice*, 742; 10 *Enc. of Pleading and Practice*, 536. Repugnancy vitiates, unless the repugnant material is rejected as surplusage.

price in the San Francisco Bay area of those materials is wholly repugnant to a charge of an agreement to exclude those materials from that area, for the latter contemplates the complete exclusion and non-handling of the materials in the area, while the former contemplates their continued handling and not their exclusion. Petitioners' demurrers in fact raised this very objection of repugnancy (Par. X at R. 55; par. VII at R. 94). The purpose of the demurrer for repugnancy was to crystallize the charge so that these defendants would know exactly what they were required to meet. To the objection of repugnancy the government replied thus (Brief in District Court, at p. 13):

"This objection, like the other objections that are proposed to this indictment, is founded upon a deliberate insistence upon construing each paragraph of the indictment as a detached charge. The indictment should be construed in its entirety (*Dunbar v. United States*, 156 U.S. 185; *United States v. Patten*, 226 U.S. 525; and *Stoers v. United States*, 192 Fed. 1 (C.C.A. 6, 1911)).

"Viewed in the light of these ordinary rules of construction, Count One of the indictment at bar charges a conspiracy to exclude from the San Francisco Bay area millwork and patterned lumber which has been manufactured under working conditions other than those prevailing in said area. Six of the paragraphs which set forth the means and methods used in furtherance of the conspiracy refer directly to an express agreement to this effect. The statement that the object and effect of this restraint was to raise and maintain the prices of millwork shipped in interstate commerce is perfectly consonant with this charge."

The construction so stated by the government was not only tenable but correct. Upon that construction of the indictment the demurrer for repugnancy was overruled and upon that construction—thus agreed to by the government and thus excluding any broader charge—these petitioners were content to plead *nolo contendere*, for to them nothing was left but an issue of law, which was fully reserved on appeal by the entry of the *nolo contendere* pleas (*Edwards v. United States*, 312 U.S. 473 at 478; *Washington Brewer's Institute v. United States*, 137 Fed.(2d) 964 (9 Cir.).

It is therefore clear that vague or general allegations in the indictment, such as those of paragraph 27(c) and paragraph 28(k), added nothing to the charge. This is further illustrated by paragraph 30 of the indictment entitled "Effect of the Conspiracy." It is there alleged (R. 33):

"The things done and the acts performed pursuant to and in furtherance of the combination herein alleged and described have had the effect of preventing persons, partnerships, and corporations located in the San Francisco Bay Area from purchasing millwork and patterned lumber manufactured in states other

"The rationale of the rule is that a plea of *nolo contendere*, like a demurrer, merely admits facts "well stated" or "well pleaded". As in any case, a defendant who has suffered an adverse ruling on an issue of law need not raise an issue of fact in order to preserve his rights on the issue of law. In a criminal case, unlike a civil case, the defendant may not refuse to plead further, for such a refusal constitutes "standing mute", whereupon a plea of not guilty is automatically entered and an issue of fact is thus raised. The legal issue can be preserved without precipitating a trial of fact only by pleading *nolo contendere* or guilty.

than California for shipment into the San Francisco Bay Area. As a result of said combination and conspiracy, the prices of millwork and patterned lumber used in the construction of homes and other buildings in the San Francisco Bay Area have been arbitrarily, unduly and unreasonably increased."

This paragraph directly relates the alleged effect on price to the exclusion of out-of-state material, and since it is here also alleged that out-of-state material was excluded from the Bay Area, the allegations of paragraph 28(k) can have reference at best only to locally produced millwork and not to millwork from out-of-state.

That the gist of the indictment is the validity of the agreement alleged in subdivision (b) of paragraph 28 of the indictment is also shown by the trial of the cause. While the Lumber Products group did not participate in that trial, it is proper to point to the course taken by the trial and to what the government there sought to prove as confirming our statement of the true construction of the charge made by the indictment. (For an analogous situation, cf. *United States v. Adams Express Co.*, 119 Fed. 240). In this connection we refer to the briefs filed herein by the labor petitioners in Cases 666, 667, and 674.

Since the sufficiency of criminal pleading is to be determined by practical and not technical considerations (*Asgill v. United States*, 60 Fed.(2d) 780, 784, 4 Cir.), and queries are to be answered in the manner most favorable to the accused (*Johnson v. United States*, 95 Fed.(2d) 813, 815, 4 Cir.), and in the light of the concession made by government counsel both in the District Court and in the

Circuit Court of Appeal, the nature of the charge is, we submit, entirely clear.

The Vital Facts.

The vital facts with respect to the agreement charged to be illegal are these: It was not an agreement aimed at out-of-state millwork because it was out-of-state millwork. It was an agreement directly related to labor standards. The matrix of the agreement was the employer-employee relationship.⁵ The objective was the protection of labor standards, and the exclusion of out-of-state materials, if any, was only incidental to the protection of San Francisco Bay area wage and working conditions. This incidental character is also shown by the fact that the indictment found it necessary to allege by way of inducement or preliminary recital that some out-of-state mills maintain a lower wage scale than Bay area mills (R. 7, 8).

The Source of the Clause.

It is said in the brief attached to the petition in Case 667 (at p. 10):

"Stripped of conclusions and characterization, the ultimate factual charge of the indictment is that defendants effectuated a conspiracy to restrain inter-

⁵For this reason a case such as *Columbia River Co. v. Hinton*, 315 U.S. 142, cited by the government below, is not in point. That case merely involved a controversy "upon which the employer-employee relationship has no bearing." So, also, *American Medical Association v. United States*, 317 U.S. 519.

state trade in millwork and patterned lumber by defendant employers acceding to wage scale demands of defendant unions in return for which defendant unions agreed not to handle or work on material manufactured under a lesser wage scale (R. 4-37)."

According to this statement, the indictment charged that the request for the clause excluding materials produced under inferior labor standards came from the employers in return for acceding to wage demands. A similar statement as to the source of the exclusion clause appears in the opinion of the court below (144 Fed.(2d) at 548). We believe, however, that no significance has been attached by the government to any language of the indictment which might bear such a construction. Indeed, at the trial the government not only did not prove, but made no attempt whatever to prove, that the clause was inserted at the employers' request. It is an undisputed fact that it was the unions which affirmatively insisted on the exclusion clause, and that the employers merely acceded to the demand of the unions. The fact is so stated in the petitions filed here by the labor unions. Thus the brief attached to the petition in Case 667 also states (at p. 11):

"The evidence shows without conflict that such clause was not included at the instance of defendant employers but of defendant unions; that the list of material exempted from the restriction was added at the insistence of the employers over the objection of the unions as a qualification of the latter's complete closed shop demand. The purpose in seeking a closed shop was the normal objectives of jobs for union members and the increase and standardization of wages."

The petition in Case 666 is much longer, and its whole tenor is that the clause was one upon which the unions had been insisting for years and which they imposed on the employers. While the issue involved in the case of the instant petitioners is the sufficiency of the indictment, and not of the proof, yet in the Circuit Court of Appeals the government did not claim that the indictment charged more than it claimed to have proved at the trial, and it treated the legality of the combination charged and that proved as identical:

Moreover, we submit that it is quite irrelevant from which side, or at what point, or in what manner, the clause came into the collective bargaining agreement. We state our reasons for this position at pages 38 to 48 below.

II.

THE INDICTMENT CHARGES NO OFFENSE

The labor union appellants, the petitioners in Cases 666, 667, and 674, discuss with care and in detail the statutes enacted in recent years, such as the *Norris-LaGuardia Act*, and point out that the agreement was not a violation of the Sherman Act under those statutes and the reasoning and authority of cases such as *United States v. Hutcheson*, 312 U.S. 219; *United States v. Building & Construction Trades Council*, 313 U.S. 539; *United States v. United Brotherhood of Carpenters, etc.*, 313 U.S. 539; *United States v. International Hodcarriers, etc. Council*, 313 U.S. 539; *United States v. Carozzo*, 37 F.Supp. 191, affirmed 313 U.S. 539; and *United States v. American Federation of Musicians*, 47 F.Supp. 304, affirmed 318 U.S. 741.

With this discussion we fully agree, and we adopt the argument. Avoiding duplication where possible, we devote ourselves to a somewhat different approach. It is our position that quite apart from any special immunities that labor may have by reason of the *Clayton* or *Norris-LaGuardia Acts*, the covenant involved in the present case was not illegal because it was not a restraint in the common law sense, or, if a restraint, it was not unreasonable.

A. THE SHERMAN ACT CONDEMNS ONLY RESTRAINTS THAT ARE UNREASONABLE AND FOLLOWS THE COMMON-LAW TEST OF REASONABLENESS.

The Sherman Act does not make illegal every restraint of trade which interrupts interstate transportation, but only unreasonable restraints. Disclaiming all novelty, it merely applies federal criminal sanctions in the field of interstate commerce to such restraints as are civilly unlawful at common law.

This principle no longer needs exposition. Enunciated in *United States v. Standard Oil Company*, 221 U.S. 1, it has been strongly reaffirmed, particularly as regards labor matters, in *Apex Hosiery Company v. Leader*, 310 U.S. 469 (cf. pp. 486, 497-499). And see *United States v. Gold*, 115 Fed.(2d) 236, 237 (2 Cir.).

Thus, it was said in the *Apex* case (p. 497):

“Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.”

The “rule of reason” has heretofore been applied, in enforcing the antitrust laws, to agreements between employ-

ers and labor. *National Association of Window Glass Mfrs. v. United States*, 263 U.S. 403 (per Mr. Justice Holmes).

As said by Mr. Justice Brandeis in *Bedford Cut Stone Company v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37, "The act does not establish the standard of reasonableness." The determination of what is "reasonable" involves social judgments and a choice of ends, which, we submit, has already been made in the American polity with respect to the issue involved in this case.

Prior to the decision of the *Apex* case, Mr. Edward H. Miller of the *Antitrust Division* of the Department of Justice, in an article entitled "Antitrust Labor Problems: Law and Policy" appearing in a symposium on the Sherman Act in Vol. VII, No. 1, of *Law and Contemporary Problems* (Winter, 1940) referred to the *Window Glass* case and to the opinion of Mr. Justice Brandeis in the *Bedford Stone* case and said:

"The right of collective bargaining by labor unions was and is recognized by the antitrust laws to be a reasonable exercise of collective power. The Department does not question, or have any desire other than to protect, the right of labor unions to use their bargaining power legitimately to consolidate it, to forestall speed-up systems, and to improve the condition of their members by promoting improvements with respect to wages, hours, health, and safety. To restraints of trade resulting incidentally from such activities, the rule of reason prefixes the legalizing 'reasonable'."

CONDUCT ELIMINATING COMPETITION BASED ON DIFFERENCES IN LABOR STANDARDS DOES NOT VIOLATE THE SHERMAN ACT, THOUGH IT INFLUENCES PRICES BY VIRTUE OF THAT ELIMINATION.

Combinations and agreements aimed at legitimate labor objectives are legal even though they do restrain interstate commerce.⁷

As this court pointed out in the *Apex* case, the activities of labor organizations necessarily restrain competition but are not for that reason violative of the Sherman Act.

"A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted either be-

The parties drafting the indictment realized this to be so, because in paragraph 29 (R. 32) it is alleged that the defendant unions were not attempting to enforce or protect the right to bargain collectively on wages, hours and working conditions or any other "legitimate objective" of labor. But paragraph 29 states a pure conclusion of the pleader concerning the significance of the agreement. Whether that agreement is aimed at a legitimate objective is a question of law presented on the face of the indictment. As said by the present Chief Justice in *United States v. Hutcheson*, 312 U.S. 219, at 239:

"The legality of the alleged restraint under the Sherman Act is not affected by characterizing . . . as this indictment does, as . . . not within the 'legitimate object of a labor union'."

To the same effect, *United States v. American Federation of Musicians*, 47 F.Supp. 304, 309, affirmed 318 U.S. 741; *United States v. Bay Area Painters and Decorators Joint Committee*, 49 F.Supp. 733.

cause it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' (p. 502)

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coals v. United States*, supra (288 U.S. 360, 77 L.Ed. 829, 53 S.Ct. 471). *Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective, it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209, 66 L.Ed. 189, 199, 42 S.Ct. 72, 27 A.L.R. 360, *an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.*" (p. 502)

This court further said in footnote 24, page 504:

"Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the estab-

lishment of industry wide standards both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act."

It then referred to the Norris-LaGuardia Act, the Public Contracts Act of 1936, the National Labor Relations Act, the Railway Labor Act of 1934, and the Fair Labor Standards Act of 1938, and concluded footnote 24 as follows:

"This series of acts clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy."

See also *United States v. Hutcheson*, supra; *United States v. Building and Construction Trade Council*, supra; *United States v. International Hod Carriers, etc. Council*, supra, and *United States v. American Federation of Musicians*, supra, and the discussion of these cases in the briefs of the labor union appellants in Cases 666 and 667.

It seems evident that the dissenting opinion of Mr. Justice Holmes and Mr. Justice Brandeis in *Duplex Printing Press Company v. Deering*, 254 U.S. 443, the dissenting opinion of Mr. Justice Brandeis and Mr. Justice Holmes and the separate opinion of Mr. Justice Stone in *Bedford Cut Stone Company v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37, reflect what is now accepted as the law, particularly in view of the Norris-LaGuardia Act (*United States v. Hutcheson*, supra, at 236; *Milk Wagon*

Drivers' Union v. Lake Valley Farm Products Co., 311 U.S. 91). In the *Bedford* case, Mr. Justice Stone said, at page 55:

"As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. . . . I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade."

We also call attention to the dissenting opinion of Mr. Justice Holmes in the same case.

C. THE QUESTION UPON WHICH DECISION TURNS IS THE EXTENT AND NATURE OF THE INTEREST WHICH THE PARTIES SEEK TO PROTECT.

The question upon which decision turns is the extent and nature of the interest which the parties are seeking to protect.⁸

There can be no question of the exceptionally close relation between the protection of labor interests and a rule excluding from the local area materials produced under inferior labor standards. Such a rule has far closer connection with labor's ultimate end than, for example, union and closed shop rules. The better reasoned decisions have always held that boycotts, rules, and other conduct designed to enforce all union shops were legal and non-violative of the Sherman Act though interstate commerce

⁸Cf. page 85 of the article by Mr. Edward H. Miller referred to in the footnote 6 supra.

was directly restrained, on the ground that unionization was reasonably related to the immediate and legitimate interest of preserving wages and working conditions,⁹ and this view is now, of course, the accepted law (*United States v. Hutcheson*, supra).

A fortiori, the agreement in the present case is less subject to criticism, since it is even more closely related to preserving wages and working standards. Under it, if goods are produced by a mill maintaining the standards of wages and working conditions embodied in the Bay area collective bargaining agreements, those agreements do not prevent the purchase of or the performance of work on such goods, though they may be obtained from a non-union shop, either in California or out of California. And if the goods are produced in a mill with standards less favorable to labor than those in the Bay area, the goods are excluded though produced in California or in a union shop. The restraint of interstate commerce is incidental to protection of working standards in the local area.

In *C. S. Smith Metropolitan Market v. Lyons*, 16 Cal. (2d) 389 at 400; 106 Pac.(2d) 414 (Oct. 14, 1940), the court notes what ought to be a commonplace to any student of economics:

"The members of a labor organization may have a substantial interest in the employment relations of an

⁹Cf. *Rossert v. Dhuy*, 117 N.E. 582, 221 N.Y. 342 (an opinion concurred in by Mr. Justice Cardozo); opinion of Mr. Justice Holmes in *Paine Lumber Company v. Neal*, 244 U.S. 459; *National Fireproofing Company v. Mason Builders Association*, 169 Fed. 259 (2 Cir.).

employer although none of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. * * *

"Modern industry is not organized on a single shop basis, * * *. The market for a product may be so competitive that one producer cannot maintain higher labor standards resulting in higher costs than those maintained by his non-union competitors."

The interest of those in an industry in the working standards elsewhere in the same industry is recognized in the *Apex* decision, where this court, in stating that public policy commends; and that the Sherman Act does not legalize, the elimination of competition "based on labor conditions regarded as substandard", expressly referred to the "establishment of *industry-wide standards* * * * by collective bargaining" (310 U.S. 501, Note 24).

In view of the foregoing principles, it can no longer be denied that labor may follow a course of conduct designed to protect its working standards and wages or even its strength as an organization, and if the unions had threatened, or engaged in, strikes, picketing, or boycotts against the employer defendants to prevent them from handling or bringing into San Francisco millwork produced under working conditions and standards less favorable than those prevailing in that Bay area, the unions would have been immune from indictment as well as from

suit by the employers for injunction or other relief. By strike, picketing, and boycott,—by all non-violent means,—the unions could have endeavored to force the defendant employers to agree, as part of the collective bargaining process, not to handle such products.

D. THE FACT THAT THE RULE AGAINST GOODS PRODUCED UNDER INFERIOR LABOR STANDARDS WAS EMBODIED IN AN AGREEMENT BETWEEN UNIONS AND EMPLOYERS IS NO GROUND FOR CONDEMNATION.

In the present case the Circuit Court of Appeals makes a startling and unreasonable distinction and bases its decision upon it. It holds that when the unions entered into an agreement with the employers by which both sides agreed not to handle millwork produced under the inferior conditions, the pursuit of what theretofore had been a legal objective became transmuted into an illegal conspiracy. This distinction is, we submit, utterly untenable.

(1) Under the Recent Decisions and in Light of the Policy of Recent Statutes.

The theory of the court below is that the *Norris-LaGuardia Act* affords no protection to the contract between unions and employers because that act relates to "labor disputes", and, forsooth, that when labor attains its end by achieving an agreement with the employers, the dispute is over. Such a view, we submit, makes the law an expression of cloistered futility. It cannot be that by successfully obtaining acquiescence in its rule in a collective bargaining agreement, a union automatically illegalizes that rule. The agreement merely evidences the

success of the union's efforts. Unless the collective bargaining agreement contained a provision that employees would not work on materials produced under substandard conditions, union members might be faced with the dilemma of violating either their own rule or their collective bargaining agreement with their employers, for the one would command them not to work and the other would oblige them not to decline to work.

Every court that has considered the question, other than the court below, has accepted it to be elementary that the fact of participation by employers in an agreement with a union does not make illegal what was theretofore a legal objective.

Allen Bradley v. Local Union No. 3, 145 Fed.(2d)

215 (2 Cir.) (October 12, 1944). The court there expressly disagreed with the decision of the Circuit Court of Appeals in the present case. This court granted certiorari on January 2, 1945, and the case is now before this court as Case No. 702.

United States v. Bay Area Painters, etc. Committee, 49 F.Supp. 733, 738 (D.C. N.D. Cal.).

United States v. B. Goedde & Co., 40 F.Supp. 523, 532 (D.C. Ill.).

Gundersheimer's Inc. v. Bakery & Confectionery Workers' International Union of America, 119 Fed.(2d) 205 (Ct. of App., D.C.).

United States v. American Federation of Musicians, 47 F.Supp. 304, 309, affirmed in 318 U.S. 741.¹⁰

¹⁰Although there the government desired to enjoin activity of a union alone, it sought to do so on the ground that the activity was an attempt to force employers to

Rambusch Decorating Co. v. Brotherhood of Painters, Decorators and Paperhangers of America, et al., 105 Fed.(2d) 134 (2 Cir.).¹¹

We do not discuss the foregoing cases because they, and the implications of the *Hutcheson* case, have been or will be thoroughly covered in the briefs of the Labor Union petitioners in Cases 666 and 667:

In View of the National Labor Relations Act.

This court has said that the Sherman Act must be read in the light of other statutes (*United States v. Hutcheson*,

combine with the union to restrain interstate commerce and therefore sought a combination between labor and non-labor groups, which the government claimed, just as it does here, was not exempt from the Sherman Act. The court replied that the contract with the employers, if obtained, would only be for "a closed shop" in a sense large enough to include a shop which excludes not only non-union workers but also machines."

¹¹The plaintiff had by collective bargaining agreement agreed to abide by the union's rules. One of the rules, so made part of the agreement, was that if a contractor from one city engaged in a job in another, he would pay the wage scale of his own community or of the community where the job was being performed, whichever was higher. The employer sued to have this term of the agreement declared void under the antitrust laws and as an unlawful restraint of trade (see 105 Fed.(2d) at 136, second column). The validity of the requirement as a unilateral rule of the union had already been sustained in several cases (cited in 105 Fed.(2d) at 137), including *Barker Painting Co. v. Brotherhood of Painters, etc.*, 15 Fed.(2d) 16 (3 Cir.), *cert. den.* 273 U.S. 748. Here the question arose as to the validity of the requirement *when embodied in an agreement between the employer and the labor union*. Its validity was upheld.

supra). In *United States v. Carozzo*, 37 F.Supp. 191 (affirmed 313 U.S. 359), it was pointed out (p. 194) that the *National Labor Relations Act*, as well as the *Norris-La Guardia Act*, is one of the statutes constituting the matrix in which these cases must be decided. The *Apex* case, supra, in footnote 24, likewise includes the *National Labor Relations Act* in its list of statutes which must be considered.

Under the *National Labor Relations Act* it was the duty of the employer defendants to bargain with the unions. The unions' demand, that standards inferior to those prevailing in San Francisco, or which were then to be established by the collective bargaining agreement under negotiation, should not be permitted to affect the local standards, was a legitimate demand. Had the employers refrained from acquiescing in that demand, they could not have protected themselves from boycotts and strikes by suing for injunction or damages, or by seeking prosecution by the Government. Had they acquiesced in the demand and complied with the union rule, and had yet declined to put their acquiescence into a formal agreement, they would have run the risk of being held guilty of violating the *National Labor Relations Act*. *Heinz Company v. N. L. R. B.*, 311 U.S. 514 at 523 to 526; *N. L. R. B. v. Knoxville Publishing Co.*, 124 Fed.(2d) 875, 882 (6 Cir.). The stated policy of the *National Labor Relations Act* is to reduce industrial strife by encouraging agreements between employers and employees (29 U.S.C., Sec. 151), thereby, in the view of Congress, promoting that very commerce which the Sherman Act also is supposed to protect.

It simply cannot be that both the unions and the employers became guilty of violating the Sherman Act at the moment that the rule became embodied in a collective bargaining agreement, as one of the elements of the wage term. If, as said in *United States v. Hutcheson*, supra (at p. 235): "It would be strange indeed that although neither the Government nor [employer] could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines", it would be equally strange to reward the successful competition of favored collective bargaining by criminal condemnation. In *United States v. United Brotherhood of Carpenters*, 313 U.S. 539, and *United States v. Building and Construction Trades Council*, 313 U.S. 539, conduct defying orders of the N. L. R. B., and therefore repugnant to the National Labor Relations Act was held not to violate the *Sherman Act* because it was protected by the *Norris-LaGuardia Act*. How much more immune to the *Sherman Act*, then, is conduct which is favored by both the *Norris-LaGuardia Act* and the *National Labor Relations Act*?

In *Southern Steamship Company v. N. L. R. B.*, 316 U.S. 31, this court in another connection remarked (p. 47):

"Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

It may analogously be observed that the enforcement of the Sherman Act by a revitalized Antitrust Division should not be pushed in zealous disregard of another, and much later, statutory scheme of encouragement of collective bargaining (cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79).

(2) Under Common Law Principles.

Furthermore, we submit, decision does not rest merely on any question whether a labor dispute exists or has ceased, or on any considerations of recent statutes. Quite independently of the decisions beginning with *United States v. Hutcheson*, supra, and of the statutes underlying those decisions, an agreement such as is here involved should be deemed legal, because it is not unreasonable.

An agreement between manufacturers alone, to which labor is not a party, not to handle materials made under labor conditions inferior to those prevailing in the community might itself be legal. Save for combinations such as those fixing prices, agreements are not illegal merely because they restrain trade; they must be in unreasonable restraint (cf. *National Association of Window Glass Manufacturers v. United States*, 263 U.S. 403), or "an unreasonable destruction of competition" (*Paramount Famous Corp. v. United States*, 282 U.S. 30 at 41), or an "undue restriction" of competition or "undue obstruction" of trade (*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360).

Confronted with the holding in the *Apex* case that the elimination of "competition based on differences in labor standards" is not an unreasonable destruction, and that

an agreement having that objective is not condemned by the Sherman Act (*Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504), the government below argued that the stated principle is limited to a combination of labor alone to which employers are not parties. We submit that there is no such limitation. The rule of the *Apex* case was rested on basic principles common to all agreements and combinations. In finding the principle on which the defendant union was there exonerated, this court expressly referred to "the doctrine applied to *non-labor* cases", citing the *Appalachian Coals* case (p. 502). And in stating the rule concerning elimination of price competition based on differences of labor standards, it did so generally, citing, among other cases, *National Association of Window Glass Manufacturers v. United States*, supra, a case of agreement among all the manufacturers as well as with the union. The application to labor was but a specific instance of a general rule. This court said that "eliminating the competition of employers" as well as eliminating the competition of employees "based on labor conditions regarded as substandard" is not a violation of the Act (footnote 24, 310 U.S. at 504).

A more extensive immunity of combinations involving only labor, based on labor statutes such as the *Norris-LaGuardia Act*, was first announced in decisions subsequent to the *Apex* case. They establish that an agreement between labor elements alone, for selfish purposes, is wholly immune from the Sherman Act, *United States v. Hutcheson*, 312 U.S. 219. While an agreement in which employer elements participate, either alone or with labor, may enjoy no such absolute immunity, its legality is to be

tested by other factors, the purpose and objective,—by judgments “regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end”—and if the objective is “licit”—e.g.; directly and rationally related to the improvement or protection of labor standards,—the restraint is not unreasonable and therefore not illegal. *United States v. Hutcheson*, supra; *Truck Drivers' Local No. 421 v. United States*, 128 Fed. (2d) 227 (8 Cir.); *Allen Bradley Company v. Local Union No. 3*, 145 Fed. (2d) 215 (2 Cir.).

The principles determining what is “licit” were not declared in the *Hutcheson* case but stem back through the *Apex* case to the opinions of Justices Holmes, Brandeis and Stone in *Bedford Cut Stone Company v. Journeyman Stone Cutters' Assn.*, 274 U.S. 37, and *Duplex Printing Press Company v. Deering*, 254 U.S. 443, and beyond that to the mode of reasoning of Mr. Justice Holmes in his dissenting opinion in *Vegeahn v. Guntner*, 44 N.E. 1077; 167 Mass. 92 (1896).

On reason, we submit, a group of employers should be able to agree not to handle the materials of those who have a competitive advantage by virtue of the fact that the latter maintain substandard labor conditions, if necessary to enable the former to grant labor's demands for superior conditions.

Such an agreement was not illegal or void at common law (*National Fireproofing Company v. Mason Builders Association*, 169 Fed. 259 (2 Cir.), and *National Association of Window Glass Mfrs. v. United States*, 263 U.S. 403), and therefore it is not violative of the Sherman Act though it may affect interstate commerce.

National Fireproofing Company v. Mason Builders Association, supra, was a case quite similar to the present, though a civil action. One defendant was an association of builders in the City of New York. The other defendants were unions of bricklayers. The object of the suit was to restrain the enforcement of certain clauses of an agreement between the association and the unions. The agreement was one of the biennial collective bargaining agreements relating to rates of wages, hours of labor and other matters. The plaintiffs objected to two clauses, one of which required the members of the employer association to include in their subcontracts for masonry and brickwork all work in connection with installation of fireproofing; in other words, they could not subcontract fireproofing to anyone but the party doing the general bricklaying or masonry. The second clause was that no member of the bricklayers' union could work for anyone not complying with all the rules and regulations of the contracts.

The result was to confine to members of the bricklayers' unions all fireproofing work in the city of New York. The plaintiff was an out-of-state corporation engaged in the installation of fireproofing, and the effect of the agreements was to destroy its New York business.

The court held that the agreement did not violate common law (p. 265):

"It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interest of the parties is not rendered illegal by the fact that it may incidentally injure third persons. * * * So several

*laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. * * ** And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit. * * *

"The object of clause 10 manifestly was to make the stipulations of the agreement generally effective. The mason builders joining in the agreement being bound by its stipulations, it was necessary for their protection that competing outside builders should only employ bricklayers upon the same conditions. So it was for the advantage of the bricklayers themselves to have means for enforcing uniformity in terms of employment."

"It also seems clear from the testimony that the object of clause 5 was to benefit the bricklayers. Certainly from their point of view substantial benefits accrue from preventing the installation of fireproofing by separate contractors. Through the operation of this clause the men who do the exposed work secure the easier and safer inside work and more continuous employment than would otherwise be the case. The specialization of the bricklayers' trade through the growth of a class of workmen who would devote themselves to setting fire brick and would, in the end, take all that work from the ordinary bricklayer, is prevented." (p. 268.)

* * *

"It therefore follows that the defendants have not entered into a combination to accomplish an unlawful or oppressive object, or a lawful object by unlawful

or oppressive means, and are not guilty of common-law conspiracy." (p. 270)

In *National Association of Window Glass Mfrs. v. United States*, *supra* (opinion by Mr. Justice Holmes), the United States brought a proceeding to enjoin a certain combination as a violation of Section 1 of the Sherman Act. Defendants were all the manufacturers of hand blown window glass and a union embracing all labor to be had for this work in the United States. The agreement established a certain wage scale and then provided that this scale would be issued to one set of factories for one period of the year and to another for another period, but that no factory could get the scale for the entire year and without the scale could not obtain labor and must cease operation. The lower courts enjoined the combination. This court reversed the judgment and held that the combination, while in restraint of trade, was not an unreasonable restraint, because there were not sufficient men to enable all the factories producing hand blown glass to run profitably during the whole working season, and the purpose of the arrangement was to secure employment for all of the men during the whole of the two seasons. This case was decided purely under common-law principles and without reference to the *Clayton Act*, which, as now construed, would have further supported the decision.

In footnote 25 at page 507, this court said in *Aper Hosiery Co. v. Leader*, *supra*:

"Whether the interest of the labor unions in these cases¹² in maintaining and extending their respective

¹²*Bedford Cut Stone Company v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37; and *Duplex Printing Press Company v. Deering*, 254 U.S. 443.

organizations, rendered the restraint reasonable as a means of attaining that end within the common law rule, or brought the restraints within the rule of reason developed and announced in the Standard Oil case, was not discussed and we need not consider it here. *Restraints upon competitive marketing of a manufacturer's product brought about by an agreement between the employer and his employees in order to secure continuous employment of the employees was held to be within the rule of reason and therefore not an unreasonable restraint of trade in National Asso. of Window Glass Mfrs. v. United States, 263 U.S. 403, 68 L.Ed. 358, 44 S.Ct. 148.*"

In the present case, the importation into the Bay area of millwork made under labor standards inferior to those there prevailing could properly be deemed as destructive of those standards and inimical to the terms of the collective bargaining agreement embodying or attempting to establish them. Consequently, it could not be illegal at common law and, therefore, could not be illegal under the Sherman Act, to insert into such collective bargaining agreement a provision that the millwork so produced would not be handled.

In the *Apex* case (310 U.S. at 497), it was said that if an agreement serves to preserve or protect legitimate interests, previously existing, of one or more parties to the contract, it is deemed reasonable. In its opinion in the instant case the Court below said (144 Fed.(2d) at 549):

"Also there is no here the protection or preservation of a previously existing interest lending reasonableness to a restraint, but rather the bold pursuit of restraint for the direct mutual advantage of the par-

ties, to be gained by the monopoly price tribute from the consumer."

This statement is, we submit, unsound and wholly epithetical. The interest of the unions was to receive and to be protected in higher labor standards. That alone was sufficient to legalize the contract, for it is enough, under the principle of the *Apex* case, that the contract protect a previously existing legitimate interest of "one or more" of the parties; it need not protect such interests of all the parties. Nevertheless the agreement also protected such an interest of the manufacturers. That interest was to be free to grant the higher labor standards demanded by the unions and thus to have labor peace. The agreement protected a legitimate interest of labor, and it protected a legitimate interest of the employer by enabling him to comply with labor's insistence for superior wage and working conditions. To speak of "monopoly price tribute from the consumer" is to beg the very question whether the elimination of competition based on labor standards is illegal.

In *Rambusch Decorating Co. v. Brotherhood of Painters, etc., et al.*, 105 Fed.(2d) 134 (2 Cir.), which involved an agreement between employer and union that, if a contractor of one city engaged in a job in another, he would pay the scale of his own city or of the community where the job was done, whichever was higher, the court said (p. 138):

"Taking the construction heretofore had of this provision, we can see that in ultimate essence it is a requirement securing higher wages when the stated conditions exist. Any contract designed to secure

higher wages may restrain trade in one sense if it is effective, for it will hamper the weak employer who cannot afford the increase. In another sense, however, it may promote commerce by making for better and more peaceful labor relations. A contract with such a purpose is hardly to be held illegal of itself, or else all union organization goes. Cf. *National Association of Window Glass Manufacturers et al. v. U. S.*, 263 U.S. 403, 44 S.Ct. 148, 68 L.ed. 358; * * * Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the world, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. Such discrimination, if made along state lines, might violate constitutional restrictions; but as pointed out in *Burker Painting Co. v. Brotherhood of Painters*, D. C. 12 F.2d 945, *supra*, that is not the case here, for the provision applies only to cities and towns, though uniformly and without discrimination among them."

"* * * In the last analysis, the prime object of the rule attacked is to establish a standard of wages." (p. 139)

E. THE SOURCE OF THE CLAUSE IS IRRELEVANT.

It is a fact, as we have seen (pp. 15, 16, *supra*), that the clause under review came into the collective bargaining agreement upon the demand and at the insistence of the unions and not at the request of the employers. Never-

theless, because that fact may not be explicit on the face of the indictment, we now consider whether the source of the clause is relevant.

1. **The Test of Legality Is the Matrix of the Agreement and Its Relationship to Labor Standards.**

We submit that the manner in which the clause found its way into the collective bargaining agreement is not relevant to the question of its legality. It should make no difference whether the unions in the first instance demanded the exclusion of materials made under inferior standards or whether they first merely demanded certain high wages and conditions and were informed that their demands could not be granted in view of the competition of materials from mills where lower standards prevail. The vital point is the relation of the covenant to the protection of local standards, and that relationship is well expressed in the language of *C. S. Smith Metropolitan Market v. Lyons*, 16 Cal.(2d) 389, 490, 106 Pac.(2d) 414, which bears repeating:

"Modern industry is not organized on a single shop basis. . . . The market for a product may be so competitive that one producer cannot maintain higher labor standards resulting in higher costs than those maintained by his . . . competitors."

We submit that it is irrelevant from which side or at what point or in what manner a covenant comes into the collective bargaining, if, as here, it has been occasioned by legitimate labor demands, is inextricably enmeshed in the matrix of the employer-employee relationship, and is closely and rationally related to the protection of labor

standards. That matrix and that relation are the vital elements.

Once a term becomes part of the fabric of a collective bargaining agreement, and if its relationship to the protection of labor standards is evident, the warp cannot be separated from the wool by unrealistic inquiry into the manner or point of time in the bargaining when the term came into the negotiations. Such an approach ignores the essential character of collective bargaining.

In *Boyle v. United States*, 259 Fed. 803 (7 Cir.), a union had entered into an agreement with the employers in Chicago which provided that an agreed increase in wage scale "is to go into effect only in case the party of the second part has succeeded before October 1, 1911, in bringing about a condition which will prevent none but union label switchboard work to be installed in the City of Chicago." The evidence showed that it was agreed not to install in Chicago "outside made switchboards." The wage scale was thus agreed to by the employers provided that the union eliminated competition of outside switchboards. In *United States v. B. Goedde & Co.*, 40 F.Supp. 523, the court concluded that, in view of the recent decisions, the *Boyle* case, in which a conviction under the Sherman Act was affirmed, may no longer be considered good law.

In the *Allen Bradley* case, now before this court as Case 702, the restraints went even further than those in the *Boyle* case, for the agreement between the unions and the local employers in *Boyle's* case excluded out-of-state

switchboards because they were non-union, whereas in the *Allen Bradley* case the agreement between the unions and the local employers excluded out-of-state material wholly without regard to the labor standards under which the material was produced, without an opportunity to the out-of-state producers to comply with any labor standards the unions desired, and irrespective of whether those goods were union-made or made by other locals of the same International. Yet the Circuit Court of Appeals held that the law was not violated.

The District Judge in the *Allen Bradley* case had granted an injunction following a report of a Special Master. The Special Master was of the view that if the combination involved an attempt, as its objective, to improve the condition of union members by obtaining higher wages or better working conditions, or even to improve working conditions in factories outside the state, it would be legal. Concluding that the combination had no such objective, but was a bare-faced attempt to exclude out-of-state goods *per se*, the Special Master ruled for plaintiff (*Allen Bradley Co. v. Local Union No. 3, etc.*, 41 F.Supp. 727). The District Judge was of the same view (*Allen Bradley Co. v. Local Union No. 3*, 51 F.Supp. 361), believing that it was not the fact that the "employer-employee relationship was either the origin or foundation of the controversy. That relationship does not even affect the instant controversy." He distinguished decisions of this court (*Milk Wagon Drivers' Union v. Lake Valley Farm Products Co.*, 311 U.S. 91, and *New Negro Alliance v. Sanitary Grocery Company*, 303 U.S. 552), on the ground that in those cases the "employer-employee relationship

was the matrix of the controversy." Yet the Circuit Court of Appeals of the Second Circuit reversed the decision (*Allen Bradley Co. v. Local Union No. 3*, 145 Fed.(2d) 215).

The restraint effected by the agreement in the present case does not go anywhere near as far as that in the *Boyle* case or in the *Allen Bradley* case; since here the agreement was not aimed either at non-union or out-of-state materials made under labor conditions equal to the local standard.

If the court in the *B. Goedde* case was correct concerning the *Boyle* decision, or if the decision of the Circuit Court of Appeals for the Second Circuit is correct in the *Allen Bradley* case, the decision of the court below in the instant case is necessarily incorrect. On the other hand, the Circuit Court of Appeals in the *Allen Bradley* case may be in error, and still the decision of the court below in the instant case would be erroneous, for the *Allen Bradley* case is an infinitely stronger case for illegality than the present; the elements which the District Judge there found lacking are all present here.

2. A Concession That the Purpose of the Criticized Covenant Was to Enable the Employers to Meet Union Wage Demands Is Tantamount to a Confession of Error.

The government in its brief in the Circuit Court of Appeals said (at p. 36):

"The most favorable light in which this case may be put from the standpoint of the appellants, therefore, is to say that it was an agreement entered into to enable the manufacturers to meet union wage demands."

Rather, this is the *least* favorable interpretation. In any event, since an indictment must be construed as favorably as may be in favor of defendants (*Johnson v. United States*, 95 Fed.(2d) 813 (4 Cir.)), this is a concession that no view less favorable may be taken. And, we submit, it concedes the case. In the *Window Glass* case, 263 U.S. 403, the agreement restricted production in order to permit profitable operation by the employers; the restraint was nevertheless held not to be unreasonable because its effect was to enable the employers to give proper employment and wages.

To uphold the legality of the agreement in the present case does not, as the government contended below, mean that it would be lawful for labor and non-labor groups to enter into combinations whereby the non-labor groups fixed prices and the labor groups policed the prices, nor does it even necessarily mean that such combinations would be legal in any case where it could be shown that a price-fixing scheme was entered into for the purpose of enabling the non-labor groups to meet wage demands.

Not only are price-fixing agreements on a different plane, where consideration of reasonableness and unreasonableness do not enter (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States v. Tremont Pottery Company*, 273 U.S. 392), but, more important, the government's argument overlooks (1) the fact that the principle of the *Apex* case goes no further than to permit influence on price competition "by eliminating that part of such competition which is based on differences in labor standards" (310 U.S. at 503), and (2) that the agreement here

goes no further than that principle allows. Labor and employers may properly ask that those paying higher wages be free of competition of those paying lower wages. With that freedom obtained, it may be that prices should be left to rise or fall with the competitive variations of all other factors. Price-fixing agreements may be beyond the principle because they remove not merely the factor of competing labor standards but all factors. The agreement here *fixed no prices* but was confined to the elimination of the exact part of competition specified in the *Apex* case.

If ever an agreement between labor and employers can be valid, upon judgment of the "licit and illicit," the agreement in this case is it, for it is directly related to wages and working standards and goes not one step further. If this agreement is invalid, then it is difficult to conceive of any agreement between labor and non-labor groups restraining commerce which would be valid.

Neither does it follow, as the government also claimed below, that, if this agreement is held to be legal, a manufacturer group desiring to fix prices or gain a monopoly would need only to wait for a union to make a demand having to do with terms and conditions of employment, whereupon the manufacturers, professing inability to meet the demand unless prices are fixed or a monopoly given, could validly enter into an agreement to that effect with the union policing it. If the labor demands are mere subterfuge, the manufacturers in fact "using" labor for ends *unrelated to labor standards*, a different case would be presented. The law retains the power to distinguish unlike situations.

The distinction is that between a case where a labor organization is being used by a combination of others as a tool to suppress competition or fix prices¹³ and a case where the agreement between labor and employer is *rationally and directly related to a legitimate labor end*. This is the basis on which the cases relied on by the government are all to be distinguished from the present. The distinction is stated in *Albrecht v. Kinsella*, 119 Fed.(2d) 1003 (7 Cir.):

"* * * When officials of the labor union step outside their union labor fields and act as highwaymen, levying tribute on those who wish to build homes or other buildings, acting for their individual gain, the immunity granted to labor unions under the amendment to the Sherman Act does not extend to them. They are not acting as labor unions except in name. The test is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public."

In the instant case, the opinion of the court below states (144 Fed.(2d) at 549):

¹³Cases of agreement between employers and unions for purposes of extortion and racketeering, such as *Local 167 v. United States*, 291 U.S. 293, or cases involving violence are clear instances of illegality and have no relation to a case such as the present.

"Nor are the appellants aided by the statement in the Apex case that the restrictive effect upon the power of an employer to compete in commerce by the elimination of price competition based on differences in labor standards, resulting from the successful consummation of a wage agreement by a union, is not within the Sherman Act. Not only was the price competition of mill work and patterned lumber products of Washington and Oregon attributed in part to more efficient, technically improved, large scale methods, but here the elimination of competition was not a result merely incidentally flowing from the achieved objective of increased wages but the means of obtaining it."

The reference to more efficient large-scale methods of Washington and Oregon mills is wholly beside the point for the simple reason that the portion of the price competition which arose from such efficiency was not aimed at by the agreement of the parties. It was necessary for the Oregon and Washington mills only to have conformed to the Bay area labor standards, and if they then still had a competitive advantage because of large scale methods, nothing in the agreement would have prevented them from reaping in the San Francisco Bay area the benefit of such economies. But the agreement between the defendant unions and the employers would not permit those out-of-state mills to reap in the Bay area the benefit of "economies" in labor standards. That was its purpose. If it was an illegal purpose, the agreement was illegal, but otherwise not. If competition arising from non-labor economies was eliminated, that elimination was only incidental, occurring solely because producers who

operated with inferior labor standards fortuitously commanded the other economies. But certainly the possession of other competitive advantages does not confer a privilege to indulge in the use of inferior labor standards with immunity from what would otherwise be proper and legal economic pressure. Yet such is the effect of the decision of the court below.

The further statement by the court below that

"the elimination of competition was not a result merely incidentally flowing from the achieved objective of increased wages but [was] the means of obtaining it."

fully reflects, we submit, the question-begging character of the decision. Of course the elimination of competition was not a result flowing from the objective of increased wages. Such a result could flow from such a cause only as respects employers who recognized and adhered to the higher wage and labor standards. But what of those who did not so conform? That is the vital question. If "modern industry is not organized on a single shop basis," and if "the market for a product [is] so competitive that one competitor cannot maintain higher labor standards resulting in higher costs than those maintained by his . . . competitor" (pp. 23, 24, above), the failure of some competitors to conform and adhere to higher wages impairs the ability of others to give such wages to labor in the local area. It is entirely true that the elimination of a certain competition was a means of obtaining "the achieved objective of increased wages. And we submit that the elimination of that competition is justified and legalized by that very fact."

Evidently the court below was of the view that it is socially and economically unwise to deprive the consumer of the opportunity of buying goods at prices lower than possible if higher wage and work standards are enforced. This view of social and economic policy may or may not be sound, but it is not the view which the American public has seen fit to select and which has been embodied in legislation and decision.¹⁴

F. THE CASE OF UNITED STATES v. BRIMS.

In support of its contention, the government below relied primarily on *United States v. Brims*, 272 U.S. 549, decided in 1926, opinion by Mr. Justice McReynolds. (Mr. Justice Stone refrained from participating.)

It is believed in many quarters that the *Brims* case no longer expresses the correct view of the law even in its own situation of fact, that it is either wholly erroneous or that it must receive a limited interpretation (cf. *Allen Bradley Company v. Local Union No. 3*, 145 Fed.(2d) 215, and *United States v. B. Goedde & Co.*, 40 F.Supp. 523). Thus in the *Allen Bradley* case the court said (at p. 225):

"As one commentator puts it, the *Brims* case should be deflated to its position as one of a line

¹⁴At page 551 of its opinion (14 Fed.(2d)) the court below further said that the acts of the unions and the employers were

"... not to secure any legitimate advance of the laborer's interest. They are squeezing implements to extort what, in effect, is a capital levy on the home builder and other consumers."

This is but another expression of the same question-begging reasoning.

of cases uncritically condemning refusal to work on non-union products delivered in interstate commerce'—a position no longer tenable in the form stated—and that 'when the union is permitted to act alone, an agreement with employers should not automatically add the condemnable virus.' Tunks, *A New Federal Charter for Trade Unionism*, 41, Col.L.Rev. 969, 1012."

Whether the *Brims* case is still good law on its own facts or not, it is not in point. If the record in that case (No. 212, October term, 1926) is followed through, beginning with the indictment and passing through demurrer, trial, decision of the Circuit Court of Appeals, briefs of counsel before this court, and the decision of this court, the fact becomes clear. There the indictment simply charged, without more, that certain defendant mills in Chicago conspired with and used the defendant carpenters' union to prevent mills located outside of Illinois from selling and delivering their building materials into the city of Chicago,—i.e., to exclude out-of-state material, as such, for the employer's benefit. Thus the indictment alleged that there were certain Chicago manufacturing plants (defendants) and certain other named plants outside of Illinois (*Brims R.*, pp. 1, 2). It then alleged (*Brims R.* 3):

"And the grand jurors aforesaid, . . . do further present that said manufacturer defendants . . . in order to monopolize the business of supplying said builders and building contractors in Chicago with such building materials and secure excessive prices for their own building materials unlawfully have . . . engaged in a conspiracy among themselves and with

the union and contractor defendants hereinafter named, in unreasonable restraint of, and which, as hereinafter shown, in fact has substantially, materially, and unreasonably restrained the trade and commerce of said concerns * * *, whose plants are located outside of said city of Chicago and in other States than Illinois, by preventing said concerns and other concerns from and obstructing them in selling and delivering their building materials in and shipping the same to said city of Chicago for delivery there in competition with said building materials of said manufacturer defendants; which said unlawful conspiracy and the circumstances under which the same was formed and has been consummated are now here described in detail."

The indictment then averred (Brims R., p. 4):

"Said manufacturer defendants before said period of time, to wit, on April 18, 1918, by offering to employ thereafter as such 'inside' men only carpenters and joiners who were members of said organization [the union] had induced said organization and its members thereafter to refuse to install any of such building materials in houses and buildings in said city as should be sold by said manufacturing concerns whose plants were located outside of said city of Chicago and outside of said State of Illinois to builders and building contractors in said city for shipment and delivery to, said city, which said offer was thereupon accepted; * * *"

The government, in its petition for certiorari (p. 20), pointed out that the manufacturers, as payment to the unions for assisting the manufacturers' plan of exclusion, induced a third group—the contractors—to agree to a

union shop by offering them a 16% discount not given to out-of-state contractors; the government also said:

"* * * These manufacturers had no interest in the exclusion of such material as nonunion made only, but their interest arose in the restricting of the installation of nonunion-made material in the city of Chicago by reason of the fact that it would necessarily prevent and interrupt the shipment of mill-work into that territory in competition with them."

Upon overruling a demurrer to the indictment, the trial judge said (Brims R., 18, 19):

"So far as the indictment is concerned, the situation resolves itself down to this one proposition:

There is a charge here that the manufacturing defendants, by certain promises of reward, induced the labor organizations to do certain things, which resulted in an interference with interstate commerce. * * *

* * * that conspiracy will have to be proved on the trial or the case will be taken from the jury."

In his opening statement at the trial the United States Attorney remarked that while the agreement between the manufacturer defendants and union defendants referred to the exclusion of non-union material, "we will show to you gentlemen that all of these meetings together was to eliminate from the Chicago market *not union-made material, but materials made outside of Chicago*" (Brims R. 20).

The Circuit Court of Appeals reversed a conviction on the ground of variance between the indictment and the proof on the theory that the proof showed that the agreement between the employers and the union was one whereby the

union defendants would not work upon non-union-made millwork (6 Fed.(2d) 98). In the brief for the millmen defendants filed in this court, it was argued (p. 56) that the judgment was properly reversed because of the variance wholly irrespective of whether the conduct actually proved was also violative of the Sherman Act, a question not even discussed. This court concluded that there was no variance because all the evidence, taken together, was sufficient to sustain a jury verdict that the charge made in the indictment—that the real purpose of the agreement was the elimination of out-of-state competition for the benefit of the employers unrelated to the interests of the employees—had been sustained.

In contrast, the indictment in the present cases does not rest on a charge of agreement to exclude out-of-state competition but states the very terms of the agreement, which is one merely to exclude materials produced under sub-standard working conditions.

The construction of the *Brims* decision stated above is the construction given it in *Aper Hosiery Co. v. Leader*, supra. There, this court said (p. 501):

“The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States v. Brims*, 272 U.S. 549, 71 L.ed. 403, 47 S.Ct. 169; *Local 167, I. B. T. v. United States*, 291 U.S. 293, 78 L.ed. 804, 54 S.Ct. 396.”

In the *Bedford Stone* case, 274 U.S. 37, the dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, pointed out (p. 64) that in the *Brims* case

"the purpose of the combination was not *primarily* to further the interests of the union carpenters. The *immediate* purpose was to suppress competition with the Chicago manufacturers."

In the *Brims* case competition sought to be suppressed was all out-of-state competition and not, as here, mere y that portion which was based on inferior labor standard. Here the labor unions were not being used by the employers, as was certainly the case in *Local 167 v. United States*, 291 U.S. 293. Here, the agreement was one entered into as part of the collective bargaining process to protect labor standards in the Bay area. A suppression as wide and sweeping as that in the *Brims* case was held to be not illegal in the *Allen Bradley* case, *supra*.¹⁵

¹⁵The opinion of the court below states (144 Fed.(2d) at 550) that there was present in the charge in the instant case an element not present in the *Brims* case, to wit, "the enforcement of the employers' artificial and non-competitive price list, circulated to the trade and forced upon the consumer by the picketing and work-stoppages of the union." No such claim was ever made by the government in either court below, orally or in writing; and the court is simply mistaken. There is not a word in the indictment that any price list or prices were forced on consumers by picketing or work stoppages. There are references to picketing, but they relate to the enforcement of the rule against the working on and handling by laborers and employers of materials made under inferior labor standards. Nor was any proof of price lists offered.

CONCLUSION

It is respectfully submitted that Count One of the indictment states no offense, that the demurrers should have been sustained, and that the judgments of conviction should be reversed with direction to dismiss the indictment.

Dated: San Francisco, California, February 5, 1945.

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